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Nos. 91-977 and 91-1025

In the Supreme Court of the United States

OCTOBER TERM, 1991

DISTRICT 6, INTERNATIONAL UNION OF INDUSTRIAL SERVICE, TRANSPORT & HEALTH EMPLOYEES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

HUMAN DEVELOPMENT ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board, in determining that an employer unlawfully recognized a minority union, properly discounted authorization cards signed by employees who also signed cards for a rival union.

2. Whether the Board adequately articulated the basis for its decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A49) is reported at 937 F.2d 657.[1] The decision

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 91-1025.

and order of the National Labor Relations Board (Pet. App. A50-A59), the recommended decision and order of the administrative law judge (Pet. App. A59-A91), and the supplemental decision of the ALJ (Pet. App. A97-A109) are reported at 293 N.L.R.B. 1228.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A2) was entered on July 9, 1991. The petitions for rehearing (Pet. App. A110-A112) were denied on September 23, 1991. The petition for a writ of certiorari in No. 91-977 was filed on December 19, 1991; the petition for a writ of certiorari in No. 91-1025 was filed on December 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In early 1981, two unions—petitioner District 6, International Union of Industrial Service, Transport & Health Employees (District 6) and District 1199, National Union of Hospital and Health Care Employees, R.W.D.S.U., AFL-CIO (District 1199)—began separate efforts to organize home attendants employed by petitioner Human Development Association (Human Development), a not-for-profit corporation engaged in the business of providing personal home care services to Medicaid recipients in New York City. Pet. App. A60, A65, A67, A69. District 1199 conducted its campaign through solicitation of employee signatures on union authorization cards at Human Development's premises and at employee meetings, as well as through the mail. *Id.* at A69. District 6 conducted its campaign exclusively through the mail, sending union authorization cards to employees' homes and receiving signed cards in

return. *Id.* at A67. Some employees signed cards for both unions. *Id.* at A84-A87. Neither union filed a representation petition with the Board. *Id.* at A69.

During late May and early June, District 1199 made repeated attempts to reach Human Development's director, Dr. Arnold Wolf. Wolf did not return District 1199's telephone calls. Pet. App. A69. On June 6, Human Development held a meeting to count the authorization cards signed by employees on behalf of District 6. Human Development determined that District 6 did not have authorization cards from a majority of the home attendants. *Id.* at A67-A68.

On June 22, Human Development conducted a second count of authorization cards proffered by District 6. This time, Human Development concluded that District 6 had obtained at least 91 valid authorization cards from a unit consisting of 181 employees. Pet. App. A68-A69. Based on that card showing, Human Development recognized District 6 as the bargaining representative of the home attendants. *Id.* at A69. Two days later, on June 24, Human Development and District 6 executed a collective bargaining agreement that contained a union security clause and a dues deduction authorization clause. *Ibid.* In September, Human Development began deducting union dues from its employees' wages. Pet. App. A88.

On June 29, District 1199 sent a letter to Human Development requesting recognition. Human Development ignored the letter. Pet. App. A69-A70.

2. District 1199 filed an unfair labor practice charge against Human Development.[2] The Board

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[2] District 1199 did not file a charge against District 6. Consequently, the Board did not issue a complaint against District

found that Human Development violated Section 8 (a)(2) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(2) and (1), by recognizing District 6 at a time when it did not represent a majority of the unit employees, and violated Section 8(a)(3), (2), and (1) of the Act, 29 U.S.C. 158 (a)(3), (2), and (1), by executing and enforcing a collective-bargaining agreement containing a union-security clause and a dues-deduction authorization clause on behalf of a minority union. Pet. App. A52-A53, A81-A88.[3]

The ALJ determined that there were 190 home attendants in the unit on the date of recognition. Pet. App. A80. The ALJ then compared the names of the 190 employees to the names on the 134 authorization cards (excluding duplicates) signed on behalf of District 6. The ALJ found that District 6 possessed 100 valid signed cards on June 22. *Id.* at A80-A81. The ALJ then found that six of those 100 employees had also signed cards on behalf of District 1199 prior to June 22. Only one of the six employees had "expressed any preference for either union," and that was for District 1199. Applying the Board's "dual card doctrine," the ALJ reduced the number of valid authorization cards for recognition purposes signed on behalf of District 6 to 94. The ALJ therefore concluded that District 6 did not represent a majority of the employees at the time of

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6. Pursuant to its rules, the Board designated District 6 as a "party to the contract" and allowed it to participate in the unfair labor practice proceeding. See NLRB Rules and Regulations § 102.8; NLRB Casehandling Manual (Part One) § 10040.4(a).

[3] The Board rejected the conteniton that it should not assert jurisdiction over Human Development because of its relationship to a municipal agency of the City of New York. Pet. App. A51-A52, A97-A109. That determination is not at issue here.

recognition. *Id.* at A81-A87. In adopting the ALJ's conclusion, the Board found that the ALJ had "erroneously included five District 6 cards that were executed after the June 22, 1981 recognition." The Board therefore reduced the number of Local 6's valid cards from 94 to 89. *Id.* at A53.

The Board ordered Human Development to cease recognizing District 6 and giving effect to the collective agreement unless and until District 6 was certified as bargaining representative by the Board. Pet. App. A91-A92. The Board also required Human Development "to reimburse all present and former employees, except those who joined or signed authorization cards for [District] 6 prior to the execution of the collective-bargaining agreement for moneys paid by or withheld from them for initiation fees, dues, or other obligations of membership in [District] 6." *Id.* at A54.

3. The court of appeals enforced the Board's order. Pet. App. A6-A31. The court upheld the Board's refusal to count the cards of the six employees who had signed authorization cards for both District 6 and District 1199. The court noted that "for nearly fifty years the Board's policy has been that no union may count towards a majority any authorization card that was signed by an employee who also signed a card for another union, unless other evidence clearly indicates that the employee intended the later to repudiate the earlier-signed cards." Pet. App. A21 (citations omitted).

The court rejected petitioners' contention that the dual card doctrine is inconsistent with the Board's decision in *Bruckner Nursing Home, Inc.*, 262 N.L.R.B. 955 (1982). In *Bruckner*, the Board held that "an employer is not barred from recognizing a union on the basis of cards simply because a rival

union is in the picture."[4] Pet. App. A23. The court observed that "[a]fter *Bruckner* the Board uniformly applied the dual card doctrine when faced with a challenge to the majority status of a union that an employer had recognized during an initial organizing campaign involving multiple unions." *Id.* at A24. The court noted that in *Flatbush Manor Care Center*, 297 N.L.R.B. 457 (1987), the Board, "[w]hile it reaffirmed its adherence to *Bruckner*," nevertheless "found a Section 8(a)(2) violation based upon the employer's voluntary recognition of a union whose apparent majority was undercut when the dual cards were subtracted." Pet. App. A25.

The court concluded that the Board's policy was a rational interpretation of the Act. Pet. App. A27. It explained that, while *Bruckner* allows an employer to recognize one union on a showing of majority support despite the presence of a rival union, it did not alter the employer's burden of proving in an unfair labor practice proceeding that the recognized union in fact possessed valid authorization cards from a majority of the unit employees. *Id.* at A27-A28.

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[4] In *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060, 1070 (1945), the Board held that where two or more unions file representation petitions with the Board, an employer must follow a course of strict neutrality until the representation issue has been resolved in a Board-conducted election. In subsequent cases, the Board expanded the *Midwest Piping* doctrine, requiring strict neutrality whenever two or more rival unions each have some showing of support, whether or not a valid election petition has been filed. See, *e.g.*, *Pittsburgh Valve Co.*, 114 N.L.R.B. 192, 195 (1955), enforcement denied on other grounds, 234 F.2d 565 (4th Cir. 1956). In *Bruckner*, the Board returned to the position enunciated in *Midwest Piping*, under which the employer is required to maintain neutrality only if a rival union has filed a valid election petition.

The court of appeals also rejected petitioners' assertion that the case should be remanded to the Board for an explicit reconciliation of its decision with *Bruckner*. The court observed (Pet. App. A29) that "[a]lthough 'the better practice' might have been to identify and, citing *Flatbush Manor*, to brush off the argument based upon *Bruckner*, the ruling under review leaves no room for doubt that the Board applied its known position on dual cards to the case before it."

Finally, the court rejected Human Development's challenge to the Board's reimbursement order. The court found that the Board's remedy was properly designed to "effectuate the policies of the Act" Pet. App. A30 (citing *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964)). The court pointed out that Human Development's unlawful conduct had deprived its employees of their right to select their own bargaining agent and "force[d them] to join a union not chosen by the majority of their peers." Pet. App. A30.

Judge Edwards dissented. Pet. App. A34-A49. Judge Edwards did not disagree with the court's conclusion that the Board's decision in this case can be reconciled with *Bruckner*. See *id.* at A36, A49. But the dissenting judge concluded that the court's reconciliation was not the Board's position as reflected in *Bruckner* and subsequent Board decisions. *Id.* at A41-A47. Accordingly, Judge Edwards would have remanded the case to the Board for further articulation of its position. *Id.* at A49.

ARGUMENT

An employer violates Section 8(a)(2) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(2) and (1), by recognizing a union that lacks the support of a majority of unit employees.[5] *International Ladies' Garment Workers' Union* v. *NLRB (Bernhard-Altmann)*, 366 U.S. 731-738 (1961). An employer's recognition of a minority union imposes the union upon the unconsenting majority of employees and gives the minority union "a marked advantage over any other in securing the adherence of employees." *NLRB* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938). Accordingly, an employer's good faith belief that a minority union has the support of a majority of employees is no defense to the finding of a violation of the Act. *Bernhard-Altmann*, 366 U.S. at 738-739.

Petitioners do not dispute these settled principles. Petitioner Human Development contends, however, that it was unreasonable for the Board to apply its dual card policy in the circumstances of this case, and that consequently the Board erred in finding that District 6 lacked majority support. Petitioner District 6 contends that the court of appeals improperly provided a rationale different from that of the Board, contrary to this Court's decision in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). There is no merit to either contention.

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[5] Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. Section 8(a)(2) makes it an unfair labor practice for an employer to "contribute financial or other support" to a labor organization. Section 7, 29 U.S.C. 157, gives employees "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."

1. The Board has long held that where two unions are competing for representation rights and an employer signs authorization cards for both unions, neither card can be counted toward the majority status of either union unless there is evidence that the signer repudiated one of the cards. *Unit Train Coal Sales, Inc.*, 234 N.L.R.B. 1265, 1271 n.11 (1978) (collecting cases). The Board has made clear that an employer acts "at its peril" when, in a multi-union campaign, it relies upon authorization cards that turn out to be dual cards. *Intalco Aluminum Corp.*, 169 N.L.R.B. 1034 (1968), enforced, 417 F.2d 36 (9th Cir. 1969). Accord *Windsor Place Corp.*, 276 N.L.R.B. 445, 446 n.1 (1985). That is so because the existence of dual cards raises "a possibility that the claimed majority support of the recognized union could in fact be nonexistent." *Bruckner Nursing Home*, 262 N.L.R.B. at 957 n.13.

Petitioners are mistaken in contending (Pet. 91-1025 at 13-17; Pet. 91-977 at 10-13) that *Bruckner* changed this policy. The Board explained in *Bruckner* that, because its expanded *Midwest Piping* doctrine allowed a minority union with few cards to block the voluntary recognition of a majority union, it would "no longer find 8(a)(2) violations in rival union, initial organizing situations when an employer recognizes a labor organization which represents an uncoerced, unassisted majority," where no valid election petition had been filed. 262 N.L.R.B. at 957 (footnote omitted). The Board cautioned, however, that its decision did not alter its "longstanding policy" that "an employer will still be found liable under Section 8(a)(2) for recognizing a labor organization which does not actually have majority employee support." 262 N.L.R.B. at 957 n.13, citing *Bernhard-Altmann*, *supra*. The Board added that if rival

unions claim majority support based on cards, an "employer must beware the risk of violating Section 8(a)(2) by recognizing either union even though no petition has been filed." 262 N.L.R.B. at 957 n.13. The Board explained that, because "there is a possibility that the claimed majority support could in fact be nonexistent, * * * the safe course would be simply to refuse recognition, as clearly authorized under *Linden Lumber Division. Summer & Co.* v. *NLRB*, 419 U.S. 301 (1974)." *Ibid.*

2. Petitioner Human Development contends that the dual card doctrine effectively precludes voluntary recognition of a union because "an employer can be found guilty of an unfair labor practice by voluntarily recognizing one of two rival unions even where it has no *knowledge* of dual cards or of a rival union organizing campaign." Pet. 91-1025, at 16. Human Development's argument does not fit the facts of this case. As the court of appeals explained (Pet. App. A7), Human Development was aware of District 1199's organizational efforts. Instead of discussing the union's demand for recognition, Human Development "hastened to meet with District 6" and signed a collective agreement two days after according it recognition. *Ibid.* Thus, this is not a case in which the employer was unaware that a rival union was on the scene. Although Human Development asserts that it faced a "Hobson's choice" (Pet. 91-1025, at 11), in fact there was nothing to prevent it from verifying the status of District 1199 before according

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[6] In *Linden Lumber*, the Court upheld the Board's position that an employer who has not committed any unfair labor practice that would impair the electoral process may refuse to recognize a union based on a card showing. Instead, the employer may insist that the union prove its majority status in a Board-conducted representation election. 419 U.S. at 310.

recognition to District 6. See *Intalco Aluminum*, *supra*, 169 N.L.R.B. at 1034 (employer acted at its peril in relying on state certification of one union based on cards where it knew of interest of other unions and did not afford them an opportunity to participate in card check).

In any event, even where there is no rival union on the scene, an employer that chooses to recognize a union based on cards always runs the risk that, if challenged, the Board may find that some of the cards relied upon to establish majority status are invalid. The Board may find that the employer has misperceived the size or scope of the appropriate bargaining unit; that, as here, some cards are not timely dated; that card signers were not in the unit on the appropriate date; or that signatures are not authentic. The possibility that employees have signed cards for rival unions is simply an additional basis on which an employer's voluntary recognition of a union may be upset in a subsequent Board proceeding. Contrary to Human Development's contention (Pet. 91-1025 at 18), the Board's dual card policy creates no more "serious dilemma" for an employer considering according voluntary recognition of a union based on cards than does the possibility that the union's card showing may ultimately be found to be insufficient for any number of other reasons. See *Bernhard-Altmann*, 366 U.S. at 733 (no other labor organization on scene at time the employer erroneously accepted union's assertion of majority status based on cards); *Bernhard-Altmann Texas Corp.*, 122 N.L.R.B. 1289, 1291, 1304 (1959) (detailing flaws in union's card showing of alleged majority status).

3. Petitioner Human Development also complains (Pet. 91-1025 at 9-11) that the Board's remedial order requiring it to reimburse employees who did

not sign cards for District 6 prior to recognition is inconsistent with this Court's decision in *Bernhard-Altmann*. As an initial matter, the question presented in Human Development's Petition (Pet. 91-1025 at i) does not concern the propriety of the Board's remedial order. Moreover, even if the Board's remedial order were inappropriate, it would not follow that the Board's finding of a violation of the Act was incorrect. In any event, the Board's remedial order was proper.[7]

Human Development errs in contending otherwise. In *Bernhard-Altmann*, unlike this case, the collective agreement did not include any union security provisions, and the Board did not find a Section 8(a)(3) violation based on the execution of a union security clause and dues-deduction arrangement on behalf of a minority union. See 366 U.S. at 734. The Court's observation in *Bernhard-Altmann* (366 U.S. at 740) that "no penalty is attached to the violation" referred to the fact that, because the collective agreement did not require employees to join the union or pay union dues, the Board's remedy was limited to requiring that the employer withhold recognition from the minority union and cease giving effect to the contract. 366 U.S. at 735.

In this case, in contrast, the employer withheld union dues from employees pursuant to an unlawful union security clause. In that situation, this Court has upheld the Board's reimbursement remedy di-

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[7] Human Development asserts (Pet. 91-1025 at 10) that District 6 was not required to share in the reimbursement remedy because, "due to a clerical error, the Board failed to timely serve District 6 with an unfair labor practice charge." But as noted above, note 2 *supra*, the Board did not issue an unfair labor practice complaint against District 6 because no unfair labor charge was filed against it.

rected solely at the employer. See *Virginia Electric Power Co.* v. *NLRB*, 319 U.S. 533, 541 (1943) (observing that reimbursement order against the employer was "manifestly reasonable"). In *Virginia Electric*, the Court explained that such an order "returns to the employees what has been taken from them to support an organization not of their free choice and places the burden on the Company whose unfair labor practices brought about the situation." *Ibid.* In addition, the Court has rejected the position that it is inappropriate to require only one party to make whole injured employees where both an employer and a union have acted together. In *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 54 (1954), the Court rejected the contention that it was inappropriate to require a union to reimburse employees who had been unlawfully discharged at the union's behest when the offending employer had not been joined in the case and therefore was "not made to share this burden." The Court explained that "[i]t does not follow that because one form of remedy is not available or appropriate in a case, as here, that no remedy should be granted." *Ibid.*

4. Although petitioner District 6 frames the question it presents as whether the court of appeals' decision violates the doctrine of *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), in fact District 6 simply takes issue with the court of appeals' conclusion that the court's understanding of the Board's decision was adequately reflected in the Board's previous cases. Pet. App. A28-A29. In particular, District 6 contends that the court of appeals erred in concluding that the Board has sufficiently articulated its position that *Bruckner* did not undermine the rule that dual authorization cards may not be counted in determining a union's majority status in the ab-

sence of evidence as to the card signer's preference. That issue does not warrant review by this Court.

As we have demonstrated, see pages 9-10 *supra*, the Board in *Bruckner* held that a union that could establish its majority status based on cards would not be precluded from so doing just because a rival union had also obtained some cards. Thus, the fact that some employees had signed dual cards would not deprive a union of recognition where the union had sufficient cards to demonstrate majority status from other employees who had not signed dual cards. But the Board also made clear in *Bruckner* that the recognized union, if challenged, would still be required to make a valid card showing. Nothing in *Bruckner* disturbed the Board's longstanding rule that the card of an employee who has signed dual cards cannot be included in that showing. And the Board's subsequent decision in *Flatbush Manor*, *supra*, p. 6, confirmed that fact.[8]

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[8] Judge Edwards, whose dissent District 6 reiterates, admitted that "the dual-card doctrine is theoretically distinct from *Midwest Piping*." Pet. App. A37. As the court of appeals noted (*id.* at A25), the cases relied on by the dissent for the proposition that the Board has given conflicting signals as to the continuing validity of the dual card doctrine do not address that issue.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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